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## THE 'SHOW' IN THE 'SHOW TRIAL': CONTEXTUALIZING THE POLITICIZATION OF THE COURTROOM

Awol K. Allo<sup>1</sup>

How then may we devise one of those needful falsehoods of which we lately spoke—just one royal lie which may deceive the rulers, if that be possible, and at any rate the rest of the city?

—Plato, *The Republic*

### Abstract:

*Questioning the indifference of the law to its own normative correctness and its claim to legitimacy, this article explores the epistemological and ontological foundations upon which the concept and lexicon of show trial is predicated. By invoking the theory of performativity, the article distinguishes between the different models of show trials to allow for a more complex and nuanced reading of the particular nature of the show in judicial practices often called 'show trials.' By emphasizing the peculiarity of the 'show' in each 'show trial', the article seeks to reconceptualize the ambit of the criminal trial. Arguing against the emphasis on the label, it seeks to go beyond the semantics to reveal what is concealed in the invocation of the discourse of justice. It then goes on to analyze the ability of the criminal trial to survive radical political agendas aimed at shaping events outside the courtroom. The article will conclude with some reflections on the interrelationship between the juridical purposes of the trial, the nature of strategized communication, and the performative trial.*

## I. INTRODUCTION

Historically, the monopoly over the use of power is categorically bestowed in the sovereign. However, we learn from great thinkers such as Michel Foucault that power relations operate in a much more subtle, complex, and strategic manner than it usually appears. Although Foucault's brilliant conceptual and philosophical intuition exposed the discursive nature of power and its multi-level operations,

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1. Lord Kelvin Adam Smith Scholar, PhD Candidate, University of Glasgow Law School, (2009-Present), LL. M, University of Notre Dame Law School, (2008), LL. B, Faculty of Law of Addis Ababa University, (2006). I thank my supervisors, Professor Emiliós Christodoulidis and Professor Alison Phipps, for encouraging me to examine the idea of show trials as part of my PhD project on the performativity of the political trial. Their comments and guidance have been indispensable in shaping the views advanced here. I remain personally responsible for all errors and misconceptions. The research is made possible by the financial support from the University of Glasgow Kelvin Smith Scholarship Scheme.

political power is yet the most pervasive and totalizing. The exercise of this political power, informed by a particular form of ideological formation, often excludes certain deviant groups from the political process by making certain voices inaudible, certain images unseeable, and certain words unsayable. In other words, it produces its own subjects that are resistant to domination and oppression.

In *Power and Sex*, Foucault conceives power and resistance as coextensive phenomena that involve a double movement in which the resistant subject engages in political struggle with the dominant, hegemonic power. As the struggle for power predominates the exercise of political authority within the *body politic*, strategic production of regimes of truth and objects of knowledge that operate through and across systems of discourses becomes an indispensable maxim of the struggle. These strategic, rather than deliberative, formations of truth-regimes and knowledge-objects serve to authenticate and legitimize exclusionary, subjugating, and oppressive political goals. However, the form the struggle over power assumes within existing juridical and discursive framework effectively conceals and presents the legitimacy so manufactured as a potent legal force. In effect, this discourse of power relations makes the production of legitimacy and authentication of regime policies an important feature of political struggle between interest groups within society. No other institution provides the kinds of rationalizations and justifications needed for the potency of these legitimating discourses than the judiciary. The never-ending contestation between interest groups seeking to authenticate their versions of legitimacy, legality, morality, and propriety explains why and how the judiciary became a paramount site of resistance and contestation.

Otto Kirchheimer's notion of the 'enlistment of courts' on behalf of power struggle provides a stunningly insightful account of the different rationalities underpinning the politicization of the courtroom.<sup>2</sup> In Kirchheimer's schema, the phenomena that he captures by the subtitle of his book, *Using Legal Procedure for Political Ends*, the judiciary eliminates political foes and adversaries of the regime "in accordance with some prearranged rules."<sup>3</sup> Apart from securing the political order and serving as agents of justice, the courts of law provide a platform for the powerful, the invisible, the inaudible, the excluded, and the marginalized. The courtroom, because of the juridical neutrality it enjoys and its symbolic ability to elevate matters "from the realm of private happenings and partisan constructions," is viewed as strategic platform for spectacles of resistance.<sup>4</sup> In popular parlance, this spectacle is often referred to as a 'show trial.'

In this article, I will navigate through the different forms and conceptions of 'show trials' to expose the normative, discursive and political agendas underlying the 'show' in different 'show trials.' Drawing on insights from the 'Stalinist Show Trials,'—a politico-juridical enterprise that furnished the vocabulary used today to

2. OTTO KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* (Princeton Univ. Press 1961) [hereinafter KIRCHHEIMER].

3. *Id.* at 422.

4. *Id.* at 423.

refer to the many distinct forms of spectacles—the article seeks to reconfigure the realm of the 'show trial,' from the expression to the essence.

## II. SEMANTICS MATTER: 'SHOW' WHAT?

Legal literature and newspaper articles are replete with references to the term 'show trial.' However, there seems to be no coherent or consistent meaning attached to the term in either the popular press or the legal literature. A review of newspaper articles and legal literature on trials reveals the level of inconsistency and incoherence engendered by the struggle to capture the phenomenon of theatrics at play in trials. Although traditionally understood in a pejorative sense to raise the specter of that specific aberration of justice in Stalinist-Vyshinsky tradition during the Russian Great Purge, there emerged a different sense—a positive sense—in which the concept has entered into the popular usage.<sup>5</sup>

Society understands the world it inhabits through meaning constructed out of words that are unstable and fluid. Writing on the performativity of language in juridical discourses, Karen Zivi rightly observes that terms and concepts "may also be deployed in new ways and at new sites and in ways that break with context, displacing the original meaning of a word or a norm, denaturalizing the concept, changing the way we think or act, even engendering new forms of the culturally intelligible."<sup>6</sup> This observation is emblematic of the ways in which the concept of 'show trial' is being appropriated and re-appropriated to capture different discursive practices. What was understood in the first half of the 20th century as a practice repugnant to justice, "the most legal of virtues",<sup>7</sup> is now being used in a radically different way and in a different site, breaking with its traditional context, destabilizing the concept, as an essential requirement of justice itself.<sup>8</sup> However, despite the appropriation of the same term to signify two diametrically opposed juridical conceptions, both usages hail from differing epistemological and ethical viewpoints. Before a detailed inquiry into the ambit of the concept, I hope to demonstrate the malleability of the concept and the performative logic that drives it by calling into account the following references to 'show trials' in the legal literature and the popular press.

5. See generally MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY AND THE LAW* (Transaction Publishers 1997) [hereinafter OSIEL]; JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 144-146 (Harvard Univ. Press 1986) [hereinafter SHKLAR]; Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955 (2006); Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 24 (Naomi Roht-Arriaza ed., 1995); CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* (1966); JAIME MALAMUD-GOTI, *GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE* (1996); Ivan Simonovic, *Attitudes and Types of Reaction Towards Past War Crimes and Human Rights Abuses*, 29 YALE J. INT'L L. 343 (2004); RACHEL KERR & EIRIN MOBEKK, *PEACE AND JUSTICE: SEEKING ACCOUNTABILITY AFTER WAR* (2007); Steven R. Ratner, Jason S. Abrams, James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 93 AM. J. INT'L L. 253, 255 (1999).

6. Karen Zivi, *Rights and the Politics of Performativity*, in JUDITH BUTLER'S PRECARIOUS POLITICS: CRITICAL ENCOUNTERS 164 (Terrel Carver & Samuel A. Chambers eds., Rutledge 2008) [hereinafter Zivi].

7. SHKLAR, *supra* note 5, at 113.

8. Zivi, *supra* note 6, at 46.

Following the arrest of Saddam Hussein, the *Economist* wrote, “with the eyes of the world on it, the trial will be a great show.”<sup>9</sup> Calling for a sense of redemption for America’s embarrassing treatment of sexually humiliated Iraqi prisoners at Abu-Ghraib, the writer reiterated that “to refurbish America’s tarnished image in the world . . . this has to be an exemplary trial, and in that sense a ‘show trial.’”<sup>10</sup> Stressing the need to adhere to international fair trial standards, Human Rights Watch warned that “the Iraqi Governing Council must not mount a political ‘show trial’ of Saddam Hussein.”<sup>11</sup> Here, the *Economist* and *Human Rights Watch* deployed the same terminology to signify diametrically opposed juridical practices.

Following the 2009 post-election violence in Iran, Roger Hardy accused Iranian authorities of staging a ‘show trial,’ a sorry spectacle against the opposition.<sup>12</sup> Human Rights Watch expressed concern over the impartiality and fairness of the trial proceedings, saying that “there is nothing quite like a ‘show trial’ and televised confessions to demonstrate the authoritarian tendencies of those running the government.”<sup>13</sup> “The Iranian authorities are terribly concerned to avoid a ‘velvet-type revolution,’” wrote Barbara Falk, and that their current adventurism on “a series of classic ‘show trials,’ complete with conspiracies, secret evidence, and ‘confessions,’ maybe brings them closer to regime change than they themselves realize.”<sup>14</sup> Objecting to Attorney General Eric Holder’s decision to prosecute Khalid Sheikh Mohammed (KSM) before a civilian court, former Vice President Dick Cheney said, “I can’t for the life of me figure out what Holder’s intent here is in having Khalid Sheikh Mohammed tried in civilian court other than to have some kind of show trial.”<sup>15</sup> For Cheney, offering KSM and the other four suspected terrorists a fair public proceeding was a strategic disaster for the United States because “they’ll simply use it as a platform to argue their case – they don’t have a defense to speak of – it’ll be a place for them to stand up and spread the terrible ideology that they adhere to.”<sup>16</sup> Arguing against Cheney’s view and conceding the inevitability of spectacle on both sides of the case, James Taranto wrote, “These trials will differ from an ordinary show trial in that the process will be fair even though the verdict is predetermined.”<sup>17</sup> Here, too, we recognize the

9. Editorial, *The Case for a Show Trial*, THE ECONOMIST, 18 Dec. 2003, at 12.

10. *Id.*

11. Human Rights Watch, Iraq: No Political Show Trial for Saddam Hussein, Dec. 13, 2003, available at <http://www.hrw.org/en/news/2003/12/13/iraq-no-political-show-trial-saddam-hussein>.

12. Roger Hardy, *Iran Show Trials Make Sorry Spectacle*, BBC NEWS, available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/8223239.stm](http://news.bbc.co.uk/1/hi/world/middle_east/8223239.stm) (last visited Dec. 29 2009).

13. Human Rights Watch, Iran: Show Trial Exposes Arbitrary Detention, Aug. 4, 2009, available at <http://www.hrw.org/en/news/2009/08/04/iran-show-trial-exposes-arbitrary-detention> (last visited Nov. 12, 2009).

14. Barbara Falk, *The Problems with Political Trials*, available at <http://www.themarknews.com/articles/449-the-problems-with-political-trials>, (last visited Dec. 30, 2009) (“In an effort to avoid revolution, Iran’s Islamic regime is holding a series of ‘show trials.’ History suggests this is a very bad move”).

15. Andrew Ramonas, *Cheney Says Holder Wants ‘Show Trials’ for KSM*, Nov. 23, 2009, available at <http://www.mainjustice.com/2009/11/23/cheney-says-holder-wants-show-trial-for-ksm/>.

16. *Id.*

17. James Taranto, *Obama’s Show Trials*, available at <http://online.wsj.com/article/SB1000142405274870368380457453383322052624.html>, (last visited Dec. 31, 2009).

different senses in which the concept is used, one that requires a thorough attention to the linguistic dimension of the concept.

The legal literature is no less exposed to this inconsistency and incoherence, which Jacques Derrida sees as the 'excessive qualities' of the 'grammar of language.'<sup>18</sup> In his article, titled *Between Impunity and 'Show Trials'*, Martti Koskenniemi writes, "a trial that 'automatically' vindicates the position of the prosecutor is a 'show trial' in the precise Stalinist sense of that expression."<sup>19</sup> Following the tragic events of the Rwandan genocide, José E. Alvarez wrote that the trial of genocide suspects by traditional Rwandese Gacaca courts were suspected of being political 'show trials' by successor regimes bent on vengeance instead of justice.<sup>20</sup> Writing on the Israeli identity on political trials and drawing distinctions between 'political trials' and 'show trials,' Professor Leora Bilsky argues that the difference between the two turns on the question of risk, that in the latter, the irreducibility of a risk of acquittal inherent in all criminal trials is removed by the prosecuting authorities.<sup>21</sup> What if the trial is both a show trial and a political trial at once? We have already witnessed above references to 'political show trials.' Although the interrelationship and distinction between a 'show trial' and a 'political trial' transcends the mere question of 'risk,' there is something deeply suspect and discursively political which permeates the enterprise of both a show trial and a political trial. At the same time, the 'political' in the political trial and show trial is what excavates tangled issues—issues 'tied in tight knots'<sup>22</sup>—for public consideration and that which makes the 'show' appealing to the audience.

Stressing on the centrality of 'risk' to both the defense and the prosecution, Elise Diggs maintains that, "all trials must contain an element of risk—namely the risk that the accused may be freed."<sup>23</sup> "If this aspect is missing," she argues, "what we have is a 'show trial,' a clear lack of legitimacy, and no desirable legacy for the future of international criminal justice."<sup>24</sup> Jeremy Peterson opines that, "with little chance of acquittal, trials labeled 'show trials' often amount to rituals of vengeance, akin to parading the state's enemies through the streets on their way to

18. Zivi, *supra* note 6, at 164.

19. Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 11 (2002) [hereinafter Koskenniemi] (Note that for Koskenniemi, the term show trial conveys at least two meanings. In one sense, Show trials are used in their strictest sense to refer to spurious political acts such as the Stalin Show Trials which had reeducation and terror as their primary agenda. In the second sense, he refers to a show trial that is consistent with the exacting demands of justice and one which aim to redress victims and recreates the society anew. This is what he refers to as 'beneficial trials'. He writes "the reasons that make "show trials"—that is to say, trials of only few political leaders—acceptable, even beneficial, at the national level, while others are granted amnesty, are not present when criminal justice is conducted at the international plane").

20. José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 370 (1999) (citing Jeremy Peterson, *Unpacking 'Show Trials': Situating the Trial of Saddam Hussein*, 48 HARV. INT'L L. J. 257, 261) [hereinafter Peterson].

21. LEORA BILSKY, TRANSFORMATIVE JUSTICE: ISRAELI IDENTITY ON TRIAL 3 (Univ. of Michigan Press 2007).

22. RON CHRISTENSON, POLITICAL TRIALS: GORDIAN KNOTS IN THE LAW 258 (Transaction Books 1986) [hereinafter CHRISTENSON].

23. Elise Groulx Diggs, The Normative Challenges of Strengthening the International Criminal Justice System, Address Before the National Association of Criminal Defense Lawyers (July 30, 2004), in CHAMPION, Nov. 2004, at 44.

24. *Id.*

the slaughter.”<sup>25</sup> Finally, calling for a didactically pedagogical approach to regime trials for what are called ‘atrocity crimes’ in international criminal law parlance, Mark Osiel contends that there is nothing “inherently misguided or morally indefensible” about trials orchestrated with the view to bringing about a genuine “transformation of a society’s collective memory.”<sup>26</sup> For a liberal legalist of Osiel’s orientation, what matters is not that the trial is staged and used as a ‘show,’ but that there are ontological ends attributed to the ‘show.’ With that deterministic account of the ends of the trial and the context of its orchestration, Osiel advances the view that “liberal ‘show trials,’ ones self-consciously designed to ‘show’ the merits of liberal morality and the imperatives of the rule of law . . . in ways consistent with its very requirements” cannot be against the interest of justice.<sup>27</sup>

Whatever the merits or demerits of the particular variant of ‘show’ in these ‘show trials,’ the above usages reveal the degree to which the concept of ‘show trial’ is fraught with internally contradicting usages that make it almost impossible to unambiguously signify anything without a quotation mark of some form. At the crosscurrent of this linguistic turmoil, there is a classic ‘show trial’—the ‘Stalinist Show Trials’—in reference to which the various references of ‘show trials’ are understood.<sup>28</sup> These are the most scandalizing projects of persecution and terror which at their zenith involved the “purging of purgers.”<sup>29</sup> Whether one conceives of the Moscow Show Trial industry or other variants of ‘show trials’ staged within a democracy or autocracy, the nature and purpose of the ‘show’ behind every ‘show trial’ is unique. In the following section, I want to investigate into the normative foundations and structures of the criminal trial that make it vulnerable to appropriation by participants for purposes external to the criminal justice system.

### III. THE CRIMINAL TRIAL: FROM NORMATIVITY TO PERFORMATIVITY

In normative juridical terms, there is a primary, though not exclusive, purpose attached to a trial. In juridical terms, all trials function to adjudicate hard cases. Through adjudication, the trial calls into account a breach against society’s laws and orders.<sup>30</sup> Although the distinction between a ‘hard’ and ‘soft’ case is a very delicate delineation, criminal trials, as institutions, function to adjudicate cases that are criminal in their nature and so declared by the criminal law of a given jurisdiction. It is meant to provide a public forum for the parties to contest before a neutral third party arbiter the truth and falsity of their claims. In the adjudication of a criminal offense, three crucial elements—the fact (*actus reus*), the law, and culpable intent (*mens rea*)—constitute the central dynamics of the trial process.

25. Peterson, *supra* note 20, at 261.

26. OSIEL, *supra* note 5, at 6.

27. *Id.* at 65.

28. “The prison begun to fill with former NKVD’ examiners; many prisoners who had been tortured by these same examiners had the welcome experience of greeting their former tormentors as cellmates in prisons and forced labor camps,” Fainsod, 1973; 143 in Maria Loś, *infra* note 57, at 14.

29. *Id.*

30. ANTONY DUFF, LINDSAY FARMER, SANDRA MARSHALL & VICTOR TADROS, *THE TRIAL ON TRIAL: JUDGMENT AND CALLING TO ACCOUNT* 4 (Hart Publishing 2006).

These three elements are a priori established by law—statutory legislations, precedents, and applicable international conventions—to prevent the application of prejudicial retroactive legislations.

In the Anglo-American adversarial tradition, there is a division of labor between the jury, the disputants, and the judge. In this 'combat' tradition of justice, the jury is the arbiter of contested facts and the judge primarily acts as a referee and the sole arbiter of disputes over the content and meaning of the law.<sup>31</sup> In the continental inquisitorial system, the judge is the ultimate disposer of both the fact and the law.<sup>32</sup> The burden of revealing the evidence necessary for judging rests with the judge rather than with the contesting parties or the jury. Although there are similarities in terms of how these three constitutive elements of criminality—the act, the law, and culpable intent—are juridically conceived, there are substantial differences between the two systems in terms of how the proceedings are conducted and the participants acted. In both the adversarial and the inquisitorial systems, the means vary but the end pursued is the same: establishing guilt and pronouncing punishment. Nevertheless, the means within which guilt is established and the sentence is pronounced is no less important than the end itself. This is so because the functions and purposes attached to the entire enterprise of the criminal justice system is much more profound than the end of establishing guilt and pronouncing sentence. The trial process is itself as much the 'end' of the criminal justice enterprise as the clarification of guilt and innocence precisely because a nuanced understanding of the purposes of the enterprise consists both in the dispensation of justice and its didactic function.<sup>33</sup> In other words, in the criminal trial, the end is inextricably tied to the means to the extent that the means, of itself, is the end, or at least, dovetails with the end.<sup>34</sup>

The movement from normativity to performativity takes place within this subtle and dynamic relationship between the 'means' and the 'end' attributed to the enterprise of all criminal justice systems. However, the way in which the means is crafted by the trial participants to achieve their respective 'ends' rests on the nature of the case on trial, the participants, and, most importantly, on the model of the criminal trial in operation within that legal order. In the Anglo-American adversarial system, the potential for dramatization and spectacle is enormous because of the dramatic nature of the communication that takes place between the defense and the prosecution. Since the manner and substance of courtroom

31. ROBIN C. WHITE, *THE ADMINISTRATION OF JUSTICE* 124 (Blackwell 1984); For an extensive discussion of this subject, see BARTON L. INGRAHAM, *THE STRUCTURE OF CRIMINAL PROCEDURE: LAWS AND PRACTICES OF FRANCE, THE SOVIET UNION, CHINA, AND THE UNITED STATES* 8, 9 (Greenwood Press 1987); PHILIP L. REICHEL, *COMPARATIVE CRIMINAL JUSTICE SYSTEM: A TOPICAL APPROACH* 170, 172 (Pearson Educ. Inc. 2005) [hereinafter REICHEL].

32. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 3 (1986); A. V. SHEEHAN, *CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE: A COMPARATIVE STUDY WITH PARTICULAR EMPHASIS ON THE ROLE OF THE PUBLIC PROSECUTOR* 24 (1975); REICHEL, *supra* note 31, at 171-172.

33. John Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 398 (1970).

34. Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theatre*, 28 STAN. L. REV. 81, 82 (1975) [hereinafter Ball].



utterance is driven by strategic considerations rather than communicative rationality,<sup>35</sup> the ritual and the ceremonial nature of the proceeding facilitates performative appropriations of the normative codes that define the society in whose social order where the trial is taking place. Thus, there is a real potential inherent to the criminal system for the movement from the normative to the performative.

Barbara Falk describes trials as “public narratives par excellence.”<sup>36</sup> As such, they are didactic, clarifying, compelling and ritualistic events.<sup>37</sup> “Ritualized and state sanctioned exercises in adversarial struggle,”<sup>38</sup> criminal trials operate on the basis of what Leora Bilsky refers to as a ‘socio-legal binary-structure’ which constructs and attributes ‘good’ or ‘evil’ personalities to the trial participants. The adversarial trial is particularly suited for this reductive categorization of complex issues that the trial seeks to grasp only in legal-jurisprudential terms, and the spectacle it allows intensifies the consolidation of the pseudo images created by lawyers intent on theatricalizing the proceeding because the ‘means’ are strategically decided to achieve the end. Contrasting the inquisitorial and the adversarial system, a journalist reporting on the much celebrated trial of O.J. Simpson said that, “the inquisitorial system was an investigation into the truth rather than a stage battle of partisans committed to distortion.”<sup>39</sup> In the adversarial system, theatre is at the heart of the trial. The art of the lawyer is a replica of a dramatic actor—he performs to confuse, impress, persuade, and convince. Simply put, he is a performer in the theatrical sense.<sup>40</sup>

Further, the meaning of guilt and innocence in a particular trial is not always obvious to a common man. What is obvious is that to be found guilty is to be ‘evil,’ or embody some spirit thereof, while to be declared innocent is equated with the ‘good.’ However, this binary coding of ‘guilty-evil’ and ‘innocent-good’ negates the operational logic that informed the criminal process and contradicts the essence of the criminal trial as a holistic system of a specific variant of justice in which competing and often conflicting interests are technically settled. For example, although truth-seeking is the primary function of a trial, the search for truth does not justify the use of means and methods that might cause damages disproportionate to the ethical and moral imperatives of the social order. Hence, truth-seeking cannot be held to be the overriding function compared to other essential interests of societal values such as national security, protection of family, prohibition of torture, and privacy.<sup>41</sup> In order to avoid resorting to inappropriate means and methods which justify the end, the criminal process declares certain

35. Emilio Christodoulidis, *The Objection that Cannot be Heard: Communication and Legitimacy in the Courtroom*, in THE TRIAL ON TRIAL I: TRUTH AND DUE PROCESS 179, 191 (2004).

36. Falk, *infra* note 63, at 5.

37. *Id.*

38. *Id.*

39. Accuser or Inquisitor—In Search of Truth 1, available at [http://www.lag.org.uk/shared\\_asp\\_files/uploadedfiles/4E8D9938-2790-4A59-B148-843C41FEF3B2\\_ACCUSERORINQUISITOR-final.doc](http://www.lag.org.uk/shared_asp_files/uploadedfiles/4E8D9938-2790-4A59-B148-843C41FEF3B2_ACCUSERORINQUISITOR-final.doc) (last visited Feb. 21, 2010).

40. See generally, Ball, *supra* note 34.

41. Richard D. Friedman & J. Frank Yates, 2 *The Triangle of Culture, Inference, and Litigation System*, LAW, PROBABILITY, AND RISK 137, 139 (2003) (citing William Twining, *Rethinking Evidence: Exploratory Essays* (2d. ed.) (2006)), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=805053](http://papers.ssm.com/sol3/papers.cfm?abstract_id=805053).

evidence, confessions, and admissions of guilt inadmissible in the court of law. It is precisely this idea that the means do not justify the end that makes the means as important as the end in a criminal justice system.

In law, truth is a matter of probability—not an absolute certainty—that is inferred from evidence deemed legally pertinent and relevant through legal reasoning.<sup>42</sup> This makes evidence and the way in which it is communicated to the court and the audience, what is above broadly referred to as the 'means,' as an indispensable component in the criminal justice enterprise. Evidence, although a central component of every adjudicatory process from which truth is extrapolated, must be understood as a rational, if not scientific, method of determining truth. This method is chiefly concerned not with "the absolute rationality of the normative statements in question," but rather with its mechanical coherence and rational justifiability within the governing juridical order.<sup>43</sup> As a result, truth-determination requires the maintenance of operational distinctions between questions of fact and law, questions of law and opinion, questions of fact and opinion, or questions of fact and value, belief or ideology.<sup>44</sup> It is this probable, if not impossible, requirement of keeping these distinctions and the unscientific nature of the process that makes 'truth' only a probability, not a certainty. The criminal justice enterprise is, therefore, based on rules and principles that seek to strike a balance between competing interests without any claim to absolute certainty. Although these technicalities of criminal law and the probability of legal truth could result in the conviction of the factually innocent or the acquittal of the factually guilty, the binary code posited by the trial's outcome—'conviction-evil' and 'acquittal-good'—ignores that *sui generis* operational mechanic and makes the trial a crucial performative tool.

For example, in the famous libel trial of *Kastner* in Israel, we find a captivating contrast between the public and juridical understandings of the consequences of the defendant's acquittal. As a result of the binary structure discussed above, the mere acquittal of the defendant in a libel trial was socially construed to mean the conviction of the plaintiff, and it performed the very political end that a tenacious and ideologically motivated defense lawyer intended it to perform: eliminating the plaintiff from the Israeli political scene.<sup>45</sup> In juridico-normative terms, however, the acquittal of the defendant, although a vindication of the defense, does not in any way imply the conviction of the plaintiff. In addition to the appealing power of the issues that the trial parades, the binary structure inherent in the essence of the

42. *Id.*

43. Christodoulidis, *supra* note 35, at 192 (citing ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION (R. Adler & N. MacCormick, trans., Clarendon Press 1989) [hereinafter ALEXY]).

44. *Id.*

45. In 1992, the plaintiff wrote: "The smell of a corpse scratches my nostrils! This will be a most excellent funeral! Dr. Rudolf Kastner should be eliminated! For three years I have been awaiting this moment to bring to trial and pour the contempt of the law upon this careerist, who enjoys Hitler's acts of robbery and murder. On the basis of his criminal tricks and because of his collaboration with the Nazis . . . I see him as a vicarious murderer of my dear brothers" see Leora Bilsky, *Justice or Reconciliation? The Politicization of the Holocaust in the Kastner Trial*, LETHE'S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION 153, 155 (Emilio Christodoulidis & Scott Veitch eds., Hart Publishing 2001).

trial facilitates its performative appropriations. The trials of Socrates, Jesus of Nazareth, Joan of Arc, Galileo, the Nuremberg defendants, Eichmann, Barbie, Milosevic, and Saddam Hussein are all remembered not just for the interesting discussions their indictments raised in the court of law, but also for what they have performed in the court of public opinion and for the consequences they had far beyond the courtroom. Regardless of the quintessentially dramatic tool of resistance and struggle they passed on to future generations of conscientious objectors, dissenters, and activists, there have been performative appropriations of the social codes prevailing in their time. Nevertheless, it must be admitted that these trials are social dramas with their own institutionally regulated rituals in which the versatility of language plays a crucial part in the entire exercise. It is here that the full force of the trial's dynamic movement from the normative to the performative finds its material expression.

One important phenomena that is concealed by the binary structure of the criminal trial pertains to the proceeding's reductive character—reductive of complex historical, political-ideological conflicts into an “either/or proposition”.<sup>46</sup> This is generally true of all criminal justice systems in their ordinary operation. However, in trials with political overtones, this reductive architecture performs an oppressive goal of settling and closing these complex conflicts in accordance with persecutive laws deployed as a tactic of governmentality.<sup>47</sup> The fact that the binary frame of the trial reduces “history into an either/or proposition [that] fits a simplified understanding of history” makes the courtroom an irresistible strategic tool in the struggle for power.<sup>48</sup> In his arresting exploration of this matter, Frankfurt School legal theorist Otto Kirchheimer, writes:

The public is given a unique chance to participate in the re-creation of history for the purpose of shaping the future. It matters little that the segment offered in proof may be too limited, the witness from whose tales the story is reconstructed too close to or too remote from the historical events.<sup>49</sup>

Although strategic confrontations between the prosecution and the defense might open up the space for contestation, positive jurisprudence unyieldingly resisted the turning of the courtroom into a platform for historical instruction.<sup>50</sup> Citing Justice Jackson, Judith Shklar writes that “[t]he judicial process . . . is not designed to deal with radical political movements” who turn to the court for resistance and struggle.<sup>51</sup> Although the paraphernalia of legal justice setting the judicial mechanics into motion hardly survives the belligerent confrontation of radical political movements, the courtroom remains an essential performative site both for legitimation of domination and resistance to violence.

46. KIRCHHEIMER, *supra* note 2, at 423 (emphasis added); see also ALEXY, *supra* note 43 at 37.

47. For an illustrious account of law as a tactic of governmentality, see JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 94 (2006).

48. KIRCHHEIMER, *supra* note 2, at 43.

49. *Id.*

50. For an account of didactic legality, see generally DOUGLAS, *infra* note 106.

51. SHKLAR, *supra* note 5, at 217.

In fact, it is precisely this rationality of double operation inherent to criminal trials that makes the courtroom an appealing site for political contestation. The authoritative nature of the forum and its ability to raise purely partisan conflicts “into an official, authoritative, and quasi-neutral sphere” further buttresses its vitality in political struggle. In all this, the ‘show’ is the central theme.

An orthodox positivist position would deny the theatricality and melodramatic nature of courtroom proceedings. Indeed, primarily, the trial exists as an institution to adjudicate a hard case—to uncover truth and enter verdict—on the basis of the interplay between the law, the *actus reus*, and the *mens rea*—and punish a breach of normative prescriptions. For the purpose of clarity and to reveal the performative that conceals the true essence of the different kind of ‘shows’ in ‘show trials,’ I call this stage the normative ordering of a trial in the first degree—those orderings which determine the criminal responsibility and culpability of the accused. There is another layer of ordering which constitutes the super-structure of the trial, performs functions external to criminal law, and serves extralegal purposes of multiple dimensions; I call this a normative ordering of a trial in the second degree. These extralegal functions are implicit in their operation and implied from the hearings which embody dramatic narratives and performatively unburden stories of pain, loss, and suffering, from the communications between the trial participants, from the judgment which frames and closes controversial political and legal issues, and from the punishment which shames, condemns, and separates the outlaw from the society.<sup>52</sup> Depending on how many extralegal ends are attributed to the trial, the success of the second layer order depends on the successful manipulation and control of the first. The first orderings are legalist *par excellence*, whereas, the second—the implied aspects of the trial’s performance—are normative and performative. It is within this second layer ordering that the battle for spectacle and performances is waged.

To succeed in the second layer orderings—the extralegal functions of the trial—one must choose between legality and justice on the one hand, and theatre and spectacle on the other. The choice always involves a fallacy of false dichotomy, an “either-or” question, precisely because the second cannot be achieved without operating outside the narrow confines of the first. Even in constitutional democracies where the rule of law is the touchstone principle of governance, these limiting canonical sets of rules are systematically, sometimes grossly, encroached upon in order to perform better in the second layer purposes of the trial. Paul Schervish conceptualizes these temptations to intrude into the dignified space of the courtroom in terms of the destabilizing agendas some trials confront and the eventual dislocation of these canonical rules by belligerent contestants whose justification rests on a teleology exterior to the prevailing legal order.<sup>53</sup>

52. The distinctions are not watertight. The performative is however cognizant in what consists of the communication in which the judgment is foreground.

53. PAUL G. SCHERVISH, POLITICAL TRIALS AND THE SOCIAL CONSTRUCTION OF DEVIANCE, 7:3 QUALITATIVE SOCIOLOGY 195, 196 (Fall 1984) [hereinafter SCHERVISH].

### A. The Stalinist Show Trials: Performing Avant-garde Poetic Justice

All that is needed to achieve total political domination is to kill the juridical in humankind.

—Hannah Arendt, *The Origins of Totalitarianism*

In his book titled, *Show Trials: Stalinist Purges in Eastern Europe*, George Hodos explains the historical-political terrain which shaped the turn of the law and theatre as disguised instruments of repression and ideological instruction. According to the ideological discourse of the time, deviant individuals and groups often referred to as ‘counterrevolutionaries,’ ‘Trotskyists,’ ‘Secessionist,’ ‘subversives,’ and ‘spies,’ with such aims as ‘conspiracy to topple the people’s democracies’ or the Soviet Union were tried in the court of law in ways that legitimized and consolidated the regime’s political and ideological goals. These trials were staged and ‘shown’ to the public not just to show that they were mere foes or adversaries of the regime, but also to consolidate the idea that they were private enemies of every Soviet citizen.<sup>54</sup> In significant part, the ‘show trial’ is planned and staged with the view of concretizing and consolidating this understanding through tortured and scripted confessions. The legal moment of the trial serves to validate and legitimize an alternative truth set up by the regime and acted by the trial participants according to prearranged rules, before handpicked juries and judges. Hodos uses the term ‘show trials’ in a very specific sense to capture the essence of the ‘show’ in that historical frame. He writes:

The show trial is a propaganda arm of political terror. Its aim is to personalize an abstract political enemy, to place it in the dock in flesh and blood and, with the aid of a perverted system of justice, to transform abstract political-ideological differences into easily intelligible common crimes. It both incites the masses against the evil embodied by the defendants and frightens them away from supporting any potential opposition.<sup>55</sup>

The ‘Moscow show trials’ of the late 1930s constitute a classic example of ‘show trials’ against which the legitimacy, legality, justice, and ritualistic dramatization of every variant of a ‘show trial’ is measured. The ‘Moscow show trials’ do not quite fit any of the schemas of performativity discussed in the previous section. For example, Ernest Clark contends that the ‘Moscow show trials’ have nothing to do with the adjudication of a case as “all the factual and legal issues have been decided before hand.”<sup>56</sup> In other words, the verdict is made before the case is tried, and the trial is staged for a purpose that has nothing to do with the disposition of the case. Indeed, if a trial is not about an adjudication of a case, (i.e., if juridical authority is not calling into account a breach of the criminal law according to accepted juridical standards), it is no longer a trial. If the commission of the criminal act and responsibility under the law is determined

54. See generally Ernest Clark, *Revolutionary Ritual: A Comparative Analysis of Thought Reform and the Show Trial*, 9:3 STUDIES IN COMPARATIVE COMMUNISM, 226 No (1976) [hereinafter Clark].

55. GEORGE H. HODOS, *SHOW TRIAL, STALINIST PURGES IN EASTERN EUROPE*, (1948-1954 xiii (1987).

56. Clark, *supra* note 54, at 227.

beforehand on the basis of prefabricated charges and evidence, the trial is indeed a sham—a legal farce—and theatre in the fictitious sense of the term.

In Vyshinskyan parlance, the legality or otherwise of an act is immaterial for criminal culpability.<sup>57</sup> Intent, the central requirement of all culpable conduct, is thinly and pathologically defined so that “having mildly oppositionist intent was equivalent to carrying out acts with violent, counterrevolutionary consequences.”<sup>58</sup> Thus, in a system in which there is no middle ground between a complete conformity to Stalinist socialist ideology and total enmity, to be mildly in opposition to the official views and carry out conduct remotely tantamount to furthering a “counterrevolutionary objective,” is to engage in the most sinister of anti-Soviet conspiracy.<sup>59</sup> During Stalin’s Era of Great Terror, concepts such as guilt, justice, procedural guarantees, and the language of ‘right’ were ideologically defined to suit the regime’s revolutionary class expediency. They were seen as malevolently bourgeois conceptions and loosely defined in an ideologizing fashion.

Just as the Nazi People’s Courts setup following the *Reichstag Fire* were controlled by the Gestapo and served as legitimizing machines of Nazi terror, the Stalinist Show Trials under the control of diehard Stalinists served the abominable task of dehumanization and elimination.<sup>60</sup> Stalin’s Prosecutor General, N. V. Krylenko, famously spoke of “a new law and new ethical norms” anchored in the pursuit of revolutionary principles that brought about “the most desirable results for the masses of workers and peasants.”<sup>61</sup> For this architect of Stalinist prosecutorial policy, it was not individual guilt that triggered the operation of the criminal process, but rather class expediency in which workers used the courtroom as a platform in their struggle against their enemies. Emphasizing the instrumental quality of Soviet criminal justice, Krylenko asserted, “we protect ourselves not only against the past but also against the future,” which was a counter-intuitive move that allowed the retrospective application of criminal laws to advance class expediency. Indeed, as Hannah Arendt writes in the *The Origin of Totalitarianism*, this is merely a corruption of justice aimed at “killing the juridical in a human being” to “achieve total political domination” and to do so, Arendt intuitively reflects, “totalitarianism is never content to rule by external means,” rather, it “has discovered a means of dominating and terrorizing human beings from within.”<sup>62</sup>

In totalitarian political orders, such as the Soviet Union after 1930 and Nazi Germany after 1938, the courtroom offered an internal mechanism for total control and domination. Partisan trials were used primarily as an instrument of terror

57. See Shklar, *supra* note 5, at 144; see generally MARIA LOŚ, COMMUNIST IDEOLOGY, LAW AND CRIME: A COMPARATIVE VIEW OF THE USSR AND POLAND (1988).

58. See Clark, *supra* note 54, at 232.

59. *Id.* at 232-33. He argues that “[t]he manipulation of realities by the show trial is performed symbolically. Those in control of the ceremony alone possess the prerogative to invoke or withhold the symbols of the hidden reality. In this case, symbols drive from ideology; “revolution” and “counter-revolution” label portions of reality, as do the various “isms” frequently cited: “Trotskyism”, “rightism”, “leftism.” But compare ARENDT, *infra* note 62, considering ideology as ‘inherently monopolistic and coercive’.

60. CHRISTENSON, *supra* note 22, at 27.

61. ALEKSANDR I. SLOZHENITSYN, THE GULAG ARCHIPELAGO 306-09 (1973).

62. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 146, 162 (1968) [hereinafter ARENDT].

and strategic means of transforming the public consciousness. As Barbara Falk observed, following Julie Cassiday, these trials are not about justice but mere “ritualistic and theatrical enterprises in confession, blame and repentance.”<sup>63</sup> The ‘show trials’ within these systems are an oppressive ideological industry that produce their own versions of reality and compel defendants and the audience to adopt the official reality as their own. Without fully accounting for the images that it creates and ideological drives that it conceals, the ‘show’ in these ‘show trials’ labels and purges the opposition while creating the condition for the willful submission of the public.

## B. Law’s Theatricality: Structural Interdependence between Law and Theatre

Theatricality, meaning the fusion of real life with theatre, and vice versa, is not typical of the Russian legal and political culture. There is evidence dating back to *Aeschylus’s Eumenides*, *Shakespeare’s Merchant of Venice*, and *Brecht’s Caucasian Chalk Circle*, which demonstrates the marriage between law and theatre in general and trial and theatre in particular.<sup>64</sup> These classic works of Western dramatists and other philosophers provide stunning evidence of the dramatists return to the law for ‘thematic,’ ‘functional,’ and ‘structural’ inspiration.<sup>65</sup> Therefore, theatre has been very much alive in all spheres of Western and Russian society since the 18<sup>th</sup> century.<sup>66</sup> In fact, in early 20th century Russia, theatre was entrenched in all aspects of life as the driving engine of the Russian Revolution.<sup>67</sup> In the adversarial system, the melodramatic battle between the prosecution and defense, with the view to capture the attention of the jury, portrays the lawyer in court as an actor in theatre.

The question then is: is there something inherently wrong in the strategization of a trial in a theatrical fashion in order to yield the best trial result for the body politic if theatre is already the *lingua franca* of the Russian state? After all, what happens on a daily basis in the courts of Western democracies is no different from creative acting. In particular, when irreducibly political questions constitute the core of the indictment, the drive at theatricality and spectacle is simply inevitable. For example, the 1925 trial of John Thomas Scopes in small town Tennessee (popularly known as ‘The Scopes Monkey Trial’),<sup>68</sup> the defendant’s amusing antics

63. Barbara Falk, *Making Sense of Political Trials: Causes and Categories*, 8 *CONTROVERSIES IN GLOBAL POLITICS AND SOCIETIES* 10 (James Milner ed., 2008) [hereinafter Falk]; see also JULIE A. CASSIDAY, *THE ENEMY ON TRIAL* (2000) [hereinafter CASSIDAY]. For a definitive account of how the ideology of the totalitarian minds evolved, see ARENDT, *supra* note 62, at 158-77.

64. CASSIDAY, *supra* note 63, at 7. She wrote “. . . the canon of western European drama, built on the foundation of Attic tragedy, regularly turns to the courtroom for its setting, to legal testimony for its dialogue, and to a trial’s verdict for its dénouement”.

65. *Id.*

66. *Id.*

67. *Id.* at 10-11, 18.

68. *Scopes v. State*, 152 Tenn. 424, 278 S.W. 57 (Tenn. 1925).

and Judge Julius Hoffman's eccentricity in the 'Chicago Seven Conspiracy Trial',<sup>69</sup> the 2006 trial of Zacarias Moussaoui (known as the 20<sup>th</sup> hijacker of the 9/11 commercial aircrafts),<sup>70</sup> and the 1995 trial of O. J. Simpson are only a few of the many melodramatic trials of the 20th century.<sup>71</sup> Jacques Vergès' defenses of Klaus Barbie (known as the 'Butcher of Lyon'), Carlos the Jackal, and recently, the perpetrators of the Khmer Rouge genocide were nothing but spectacles that earned him the nickname 'devil's advocate'.<sup>72</sup> In these trials, Vergès relied on strategies that were primarily disruptive—a phenomena that he encapsulated in the title of his book—the 'Strategy of Rupture'.<sup>73</sup> The 2009 hearing before the International Court of Justice on whether Kosovo's declaration of independence accorded with international law<sup>74</sup> is another classic example of international proceedings in which theatrical themes animated the essence of the trial. Therefore, there are several examples of Western trials in which theatrical themes have been deployed as the controlling fulcrum in performing the strategic goal of image creation and image saturation.

### C. Theatricality of the Trial and the Interest of Justice: The Quest for compatibility

One of the most disturbing effects of theatrical themes and functions in the trial is the potential intrusion of theatrical fiction into a forum that is meant to unravel truth and dispense justice. Even if one assumes that this theatrical representation will be available to both participants of the trial, dependence on theatrical themes, functions, and metaphors have the debilitating ramification of dramatizing justice. What is at stake in trial is truth, fairness, and justice. Although the art of the lawyer is similar to that of the actor, reliance on theatrical methods in the truth-seeking processes of a trial blurs the fine line between the novelty of theatre and the facticity of truth, and hence, obscures and trivializes justice itself.

In the Soviet Union, it was during Stalin's era of terror that theatricality—through 'show trials'—were institutionalized as constitutive elements of his

69. See Pnina Lahav, *Theatre in the Courtroom: The Chicago Conspiracy Trial*, PUBLIC LAW AND LEGAL THEORY RESEARCH SERIES NO. 02-16. (Boston Univ. School of Law).

70. For detailed transcripts and commentary of the trial, see The Famous Trials Website, available at <http://www.law.umkc.edu/faculty/projects/ftrials/moussaoui/moussaouihome.html>, (last accessed Aug. 14, 2010).

71. *Id.*

72. For a more nuanced account of this subject, see JACQUES DE LA STRATEGIE JUDICIAIRE, (Paris: Editions de minuit: 2006).

73. *Id.*

74. See Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Advisory Opinion of 22 July 2010) (Proceedings before the International Court of Justice). The General Assembly of the United Nations adopted resolution G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008), in which, referring to Article 65 of the Statute of the Court, it requested the Court to render an advisory opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" In the proceeding before the Court, although the opinion requested pertains to the legal validity of the act of declaration by the Provisional Institutions of Self-Government of Kosovo, 35 states participated in the proceeding that have no or little impact on their legal interest. Apart from the obvious political interest that the authors of declaration have, the mere fact of resorting to the court to authenticate and legitimize policy decisions of certain groups of states provides a revealing account of the court's productive capacity—productive of legitimacy.



socialist legal system. Although theatricality of trials is conceptually a problematic thesis by itself, the abominable injustices in the Stalinist ‘show trials’ were not a necessary consequence of theatricality itself. Instead, the injustice and repression sprang from the flawed operations of the entire machine of criminal justice and the availability of the theatrical representation only to the protagonist of the trial—the state.<sup>75</sup> In the famous Nikolai Bukharin trial (accused of conspiring with rightists and Trotskyites to disintegrate the USSR) of 1938, Andri Vyshinsky’s strategy of coercing those in the dock to confirm tortured or coerced confessions as evidence was challenged by the accused.<sup>76</sup> However, Bukharin was presented with the alternative of either remaining at the dock or agreeing to play by Vyshinsky’s game of confirming the evidence manufactured for him by the prosecution in return for appearing in court.<sup>77</sup> Although the dilemmas he faced hardly afforded him the opportunity to appear in court to record his own account of the truth for future generations, he was the only defendant in the ‘show trials’ of 1936-38 who resisted the evil performance of confessional self-depreciation. However, he was only partly successful.<sup>78</sup> In his book, *The Trial of Bukharin*, George Katov writes of Bukharin that, “[i]n the process, he found himself ensnared in a net of equivocation and ambiguous phrases, so that instead of defending what he believed to be the truth, he upheld that most powerful weapon of the very tyranny to which he had fallen victim—institutionalized mendacity.”<sup>79</sup>

In this system, there is no distinction between the subjectivity of intent and the objective nature of the consequences of an individual’s conduct. Therefore, the system, as Kirchheimer elegantly put it, creates an ‘alternative reality’<sup>80</sup> for the defendant which the trial seeks to ritualize, affirm, and publicize. But the question, then, is: if the regime does not care either as a matter of law or policy about the legality and legitimacy of its actions, why stage the ‘show’ in the first place? Why not eliminate the defendants at the backstage? Clark touches on the hub of these questions:

Essential to this ritualistic exercise, therefore, is the presence of an audience. The formal role of the public is both to validate the alternative reality and to be educated by it. Through prefabrication, the trial attempts to preclude the clash of interpretations of fact and intent. . . . Those in control of the ceremony alone possess the prerogative to invoke or withhold the symbols of the hidden reality.<sup>81</sup>

Indeed, it is through these prefabrications and unwarranted prosecutorial prerogatives that the validation of the regime’s own ‘alternative reality’ is undertaken. The prefabrications, in accordance with which the defendants confess and undertake a structured recitation of the script, facilitate the creation of a

75. CASSIDAY, *supra* note 63, at 5.

76. Ron Christenson, *The Political Theory of Political Trials*, 74 J. OF CRIM. L. AND CRIMINOLOGY, 533 (1983).

77. *Id.*

78. *Id.*

79. GEORGE KATOV, *THE TRIAL OF BUKHARIN* 192 (Notable Trials Library, 1969).

80. Otto Kirchheimer, *Politics, Law and Social Change: SELECTED ESSAYS OF OTTO KIRCHHEIMER* 408 (Frederic S. Burin & Kurt L. Shell eds., 1969); *see also* KIRCHHEIMER, *supra* note 2, at 46.

81. Clark, *supra* note 54, at 232-33.

normative uncertainty and an all-out determinacy of the trial result. In this way, the prosecution creates a nexus between fabricated allegations and existing ideologies that easily evokes outrage, discontent, and condemnation when placed within the political and social mythology in operation.<sup>82</sup> Within the existing dichotomized 'either-or' ideology, one is either a revolutionary or a Stalinist-style or a counterrevolutionary (largely understood to encompass any real or perceived opposition to the revolution). There is no middle ground. The fact that the defendants adhere to the same philosophy as the regime but differ on questions of strategy is no defense at all. In these show trials, the task of the prosecution is to situate the defendants within the camps of counterrevolutionaries, spies, and conspirators as understood in Stalinist terms. These ideological labels, "[l]argely devoid of formal meaning in themselves . . . acquire powerful symbolic content when they are attached to the thought and action of important figures."<sup>83</sup> Because the trials are orchestrated in a given socio-economic and political context, the regime specializes in the strategies and techniques used in identifying venues, audiences, and schemes of publicity that evoke "feelings of disgust, outrage, and shock."<sup>84</sup>

For Judith Shklar, Stalin's era of terror is a totalizing ideology which dictated an altogether different reality and understanding of the law and of justice.<sup>85</sup> As a result of this ideology, closed to other forms of reality other than its own, a principled opposition that could have been easily tolerated within the party rank and government was dealt with criminally in the most humiliating and dehumanizing of ways.<sup>86</sup> As enterprises in torture, forced labor, and confession, the Moscow Show Trials were ritualistic exercises in self-humiliation and dehumanization, and as such, had nothing to do with justice. In these trials, "[w]e read the transcripts almost as detective novels, not to uncover some new truth, for the 'truth' is established at the outset," writes Clark, "but to see how an author has woven a series of fabricated events into a coherent structure satisfying the genre's requirements" and exposing himself to the crudest form of self-depreciation.<sup>87</sup>

As Hodos narrates, the show trial served as a propaganda machine by situating all those who questioned, protested, and even feared Stalinist socialist dogma within the range of fire. These exercises in dramatic enterprise not only performed the task of elimination, terrorization, and education, they also served the task of expunging the political foe from the record of history. This is, indeed, emblematic of the strategy under which human beings are not only eliminated from the face of the earth but also from memory in the name of the law. This being the graphic illustration of what is popularly known as the 'Stalinist Show Trials,' all references to 'show trials,' as varied as they may be, seem to have this classic meaning of a 'show trial' in mind. In 'Stalinist Show Trials,' the primary consideration was one

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82. *Id.*

83. *Id.*

84. *Id.*

85. Shklar, *supra* note 5, at 144-45.

86. Clark, *supra* note 54, at 236.

87. *Id.* at 227.

and only one—the utility of the trial forum to eliminate the enemies of the regime in the immediate term and spreading fear, terror, and securing ultimate submission of the masses to the policies and propaganda machines of the regime in the long term. However, this conclusion on this specific genre of show trial does not, *mutatis mutandis*, justify the conclusion that the pursuit of justice through a trial is mutually exclusive with the phenomena of theatricality.

In consolidated democracies, the nature of the theatre is different. The theatre could, in fact, promote values such as reconciliation and restoration, unraveling hard truth and stories that are always uncomfortable for the society to confront. Though there are practical problems on how those extraordinary stories can be unraveled through ordinary criminal procedures, here too, there are elements of planning and control of the trial. However, if the planning and controlling task of authorities is dictated by partisan political agendas, then the trial, although a ‘show,’ is a trial that is incompatible with the interests of justice. Therefore, the idea of risk minimization through the planning and control of the trial procedure, which is one of the defining characteristics of ‘show trials’, seems repugnant to the demands of natural justice in specific context, i.e., when dictated by partisan political agendas. It is contrary to the dictate of natural justice when that planning involves experimentation in repressive legislations and/or undemocratic interference in the administration of criminal justice in order to effectively eliminate the risk of acquittal of one’s own adversary. These strategies ultimately jeopardize not only the interest of the individual on trial, but also justice itself. For justice itself must be sought in a procedurally and substantively just manner. Tampering with the established procedures of the law to deal with specific politically or ideologically pre-determined defendants violates several due process rights including the principle of the presumption of innocence.

The moment the state removes procedural safeguards traditionally accorded to the accused for its own agenda, the very element that forms the foundation of a trial—the centrality of a risk of conviction or acquittal vanishes. Arendt’s greatest disappointment with the Eichmann trial comes from the complete absence of equality of arms between the defense and the state prosecution. While the prosecution enjoyed an almost unlimited right of adducing material evidence and unburdening survivor narratives—a phenomenon she refers to as the “right of the victim to be irrelevant”<sup>88</sup>—regardless of their evidentiary potency, the defense was not able to bring into Israel his own witnesses and other exculpatory evidence. Arendt accuses the prosecution for building his case on “what the Jews had suffered, not on what Eichmann had done.” In simple terms, what Arendt meant was that cynical political and historical motives by the government rendered the trial a ‘show trial’—a legal farce.

88. In EICHMANN IN JERUSALEM; A REPORT ON THE BANALITY OF EVIL, (1963), HANNAH ARENDT discussed the prosecution’s initial gesture not to block the coming of witnesses into Israel but later said that he could not guarantee their immunity from arrest and prosecution. Also, those already incarcerated were either unable or prevented from testifying in the Eichmann trial.

#### IV. CONTEXTUALIZING THE 'SHOW TRIAL': THE CONTEMPORARY USAGE OF THE TERM

In the foregoing sections, I have advanced the view that most usages of the term 'show trials' are underpinned by operational mechanics that in some ways draws on the classic 'show trials' of the Stalin regime. However, the use of the term with reference to the 'Stalinist Show Trials' neither resolves the problem surrounding the usage of the vernacular, nor the flawed juridical foundation of such a theatrical enterprise of justice. In part, the inconsistency of the usage seems to be exacerbated by the susceptibility of the term to be appropriated to signify different juridico-political exercises. In some cases, a single author uses the term in two or three different senses.

Martti Koskeniemi, for example, uses the term in at least three different senses. Like most usages, he appropriates the term to express aberrations of justice similar to the Stalinist strategy of terror and indoctrination. When he argued that "[a] trial that 'automatically' vindicates the position of the prosecutor is a 'show trial' in the precise Stalinist sense of that expression,"<sup>89</sup> he is using the term to point to the corruption of justice that has become the legacy of Stalin's era. In making a case for national trials vis-à-vis international ones, he argued that "[t]he reasons that make 'show trials'—that is to say, trials of only few political leaders—acceptable, even beneficial, at the national level . . . are not present . . . on the international plane."<sup>90</sup> Here, the term is used in a positive sense to mean select exemplary trials.

Protesting against the conceptual juridical foundation of international criminal justice, Koskeniemi argues that "[t]he Milosevic trial—like international criminal law generally—oscillates ambivalently between the wish to punish those individually responsible for large humanitarian disasters and the dangers of becoming a show trial."<sup>91</sup> Here, the term is being used in a pejorative sense, disapproving the trial's questionable normative claim to legitimacy and its potential for injustice. For Koskeniemi, the establishment by the Security Council of the International Criminal Tribunal for the Former Yugoslavia (ICTY) with exclusive jurisdiction over nationals of former Yugoslavia while juridically excluding the potential responsibility of one of the warring factions and the North American Treaty Organization (NATO),<sup>92</sup> are compelling testimonies that render the Milosevic trial a 'show trial.'<sup>93</sup> When used in this sense, although the term portrays a pejorative view of the trial as victor's justice, it does not necessarily signify a sham exercise in ritualistic legitimization. Although the selective application of justice inevitably renders the credibility and legitimacy of

89. Koskeniemi, *supra* note 19, at 18.

90. Koskeniemi, *supra* note 19, at 11.

91. *Id.* at 1.

92. *Id.* at 18. Koskeniemi mentions the accusation against NATO Planes flying at a higher altitude to avoid or minimize casualties to NATO forces to the detriment of civilian lives.

93. *Id.* at 9. He also mentions 'the *de facto* amnesty bestowed on many war criminals in the Balkans and the illegality of the war itself' as factors rendering Milosevic's trial a 'show trial' in different senses.

the process questionable, the defendant in this type of ‘show trial’ will receive a ‘fair trial.’<sup>94</sup> In that sense, the ‘show’ in this model of ‘show trial’ is different from the ‘show’ in the ‘Stalinist Show Trials.’ According to liberal legalist conception, notwithstanding their dubious juridical formations, international trials have the potential to rise above vengeance and retribution and “perform . . . a successful ‘final judgment’ in the religious sense, a performance that would ultimately enable the state itself to function as a moral agent.”<sup>95</sup>

Emphasizing the transformative capacity of a trial, Barbara Falk observes that, “trials are . . . fundamentally shared experiences: they form part of our collective memory and are often foundational in terms of the requirements of historical or transitional justice. They symbolically signal the end of a regime and hopefully usher in a more ‘just’ political system.”<sup>96</sup> Conceived that way, the trial—as a symbolic but transformative tool—emphasizes accountability not just as a matter of conventional moral imperative, but also as a means for the community to reflect on its shared and reflexive experiences. Whatever the particularities of the ‘show’ in the Milosevic trial, there was no doubt that a ‘show’ was intended by those who control the ICTY and the defense. In the former case, the ‘show’ was easily discernible from the televising of the trial and the Security Council Resolution, which envisaged accountability as an instrument of peace and justice.<sup>97</sup> In post-conflict transitional societies such as post-war Yugoslavia, a ‘show trial’ such as Milosevic’s serves as a platform for communication and accountability—a forum for knowledge, acknowledgment, and a ritual affirmation of the noble ideals and principles of peaceful co-existence and the potency of the rule of law. From Milosevic’s perspectives, his unruly behavior was a clear demonstration of the kind of ‘show’ he intended to stage. His performative intuition rested on strategies of delegitimation of the global power order that sat to judge him by revealing the hypocrisy and concealing mechanics of neoliberal rationality.

In *Eichmann in Jerusalem*, Arendt, a vocal advocate of a narrower legalist construction of the purposes of the criminal trial, uses the term ‘show trial’ in at least two different senses—a positive and a pejorative sense. Indeed, one can even argue that she uses it in three different senses; the third being a variant of a pejorative meaning. She advances the view that insofar as the trial is planned and controlled by the state with the goal of achieving extralegal ends, the trial is a ‘show trial’ in the pejorative sense of the term. For Arendt, Ben-Gurion’s rebellious insistence on fixing history and creating what some called an ‘inviolable historical truth’ of the Holocaust through the trial of an individual in the dock,

94. Although one can question the overall legitimacy surrounding the authority of the Security Council to establish a Tribunal under the Charter, the selective nature of the trials of the vanquished – ICTY being a tribunal from whose jurisdiction the investigation and prosecution of the acts of one of the belligerent parties legally excluded by the founding statute – the tribunal’s overall institutional competence and structural and functional independence necessary for a fair trial and open justice is not publicly questioned.

95. *Id.* at 10 (citing JOHN.J. BORNEMAN, *SETTLING ACCOUNTS, VIOLENCE, JUSTICE AND ACCOUNTABILITY IN POST SOCIALIST EUROPE* 23 (1997)).

96. Falk, *supra* note 63, at 565.

97. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

renders Eichmann's trial a 'show trial' in the pejorative sense.<sup>98</sup> To achieve these extralegal (political, historical, etc.) ends, Ben-Gurion placed on trial the suffering of the Jews from dispersion, the Final Solution, the German People, anti-Semitism, racism, and the whole of mankind through the trial of a low ranking Nazi bureaucrat; Adolph Eichmann, "a person of blood and flesh."<sup>99</sup> Protesting against the prosecution's tenacious insistence on unburdening the survivors' narrative for a broader political and pedagogic end, Arendt poignantly wrote:

The focus of every trial is upon the person of the defendant, a man of flesh and blood with an individual history, with an always unique set of qualities, peculiarities, behavior patterns, and circumstances. All the things that go beyond that, such as the history of the Jewish people in the dispersion, and anti-Semitism, or the conduct of the German peoples, or the ideologies of the time and the governmental apparatus of the Third Reich, affect the trial only in so far as they inform the background and the conditions under which the defendant committed his acts. All the things the defendant did not come into contact with, or that did not influence him, must be omitted from the proceedings of the trial.<sup>100</sup>

This, however, does not in any way mean that she disapproves of his abduction, transfer, and trial. Nor does it imply her agreement with the critiques of the Eichmann trial on account of jurisdiction, *ex post facto* legislations, and procedural guarantees. Indeed, Arendt goes a long way in defending some aspects of Eichmann's trial not only as necessary, but also as legitimate.<sup>101</sup> Nevertheless, the government's heavy involvement in directing the trial, the desire for historical edification rather than clarification of the guilt or innocence of the accused, and the court's unwarranted admission of irrelevant evidence all led her to the conclusion that the Eichmann trial was a 'show trial.' Although she uses the term in a pejorative sense, she does not mean to equate this trial's pejorative nature to the classic 'show trials.' This distinction accounts for her two pejorative variants of 'show trials.'

There is a second sense, a positive sense, in which Arendt makes use of the term 'show trial'; one which is different from Ben-Gurion's 'show trial', both in terms of its designed end and its implication for her strictest conception of justice. She used the term to describe the trial of Shalom Schwartzbard, a French Jew, who assassinated Symon Petlura, a Ukrainian national whom he held responsible for the

98. See generally HANNAH ARENDT, EICHMANN IN JERUSALEM: REPORT ON THE BANALITY OF EVIL (1963) [hereinafter EICHMANN].

99. *Id.* at 285.

100. *Id.* at 286.

101. On issues of retroactive application of the Nuremberg Laws (the London Charter of 1945) and the Nazis and Nazi Collaborators (Punishment) Law of 1950, Arendt made an argument so radical at the time saying that the principle of non-retroactive application of criminal laws "violate only formally, not substantially, the principle *nullum crimen, nulla poena sine lege*, since this applies meaningfully only to acts known to the legislator." *Id.* at 254.

killings of the Ukraine Pogroms.<sup>102</sup> She also used the term to describe the action of an Armenian national, Soghomon Tehlirian, who took the law into his hands seeking revenge and publicity for the death of hundreds of thousands of Armenians during the “Armenian Genocide” by killing the Grand Vizier Talat Pasha in broad daylight in Berlin, Germany.<sup>103</sup> These two gentlemen not only decided to take the law into their own hands by assassinating individuals they held responsible for the liquidation of their people, observes Arendt, but by turning themselves in to the authorities to use the trial as a forum for public knowledge and acknowledgement of the wrongs their people had been made to suffer. In this case, the individual, rather than the state, intended the trial to be a ‘show trial’—orchestrated by a weaker party in the criminal proceeding and for a purpose different from those used by states. Arendt describes these trials as ‘show trials’ in the positive sense for two reasons: (a) the end sought to be achieved; and (b) the implication of such a ‘show’ on the discourse and the pursuit of justice. For Arendt, since trials planned by defendants—a party with much less ability to thwart the requirements of justice—involved neither the alteration of procedural rules by the state nor challenges to the overall integrity of the judicial proceedings, the penultimate purpose of the trial—weighing the charges brought against the accused, rendering judgment, and meting out due punishment—will be maintained and, for this reason, such trials, although ‘show trials,’ are ‘shows’ in a positive sense.<sup>104</sup> To that effect, Arendt observed that these trials:

. . . [I]t is true, [they] are . . . ‘show trials’, and even a show, but its “hero,” the one in the center of the play, on whom all eyes are fastened, is now the true hero, while at the same time the trial character of the proceedings is safeguarded, because it is not “a spectacle with prearranged results” but contains that element of “irreducible risk”, which, according to Kirchheimer, is an indispensable factor in all criminal trials.<sup>105</sup>

By using the term ‘show trial’ in two different senses, Arendt tries to capture at least two or at most three mutually exclusive phenomena of a trial. For Arendt, Ben-Gurion’s attempt to stage a trial for the purpose of creating memory and history—a departure from what she considers the *sine qua non* purpose,—rendered the trial a ‘show trial’ in the negative sense. Although she uses the term, as

102. For an account of the trial and the incident, see Wikipedia, the Free Encyclopedia, available at [http://en.wikipedia.org/wiki/Sholom\\_Schwartzbard](http://en.wikipedia.org/wiki/Sholom_Schwartzbard) (last visited Feb. 18, 2010).

103. EICHMANN, *supra* note 98 at 265; For an account of his trial, see Wikipedia, the Free Encyclopedia, available at [http://en.wikipedia.org/wiki/Trial\\_of\\_Soghomon\\_Tehlirian](http://en.wikipedia.org/wiki/Trial_of_Soghomon_Tehlirian) (last visited Feb. 18, 2010). The defence did not deny the act of killing. The defence pleaded insanity resulting from the Armenian Genocide of the 1915 and the defendant’s conviction of the responsibility of the deceased. In a trial that lasted less than an hour, the jury entered a verdict of “not guilty” on the grounds of “temporary insanity.”

104. EICHMANN, *supra* note 98, at 252.

105. *Id.* at 266.

Douglas accuses her of doing, to “raise the specter of Stalinist fraud,”<sup>106</sup> she maintains a clear distinction between Ben-Gurion’s ‘show trial’ and Stalin’s “theatrical enterprise in confession, blame and repentance.”<sup>107</sup> Moreover, she uses the term in a positive sense, owing to her favorable disposition towards the motive underlying the trials of the two individuals discussed above, and its implication for the overall discourse of justice. Without making an explicit use of the term in its classical sense, Arendt tries to bring to light an aspect of a criminal trial that departed from traditional criminal proceedings in terms of the ends it sought to achieve and its implication for the overall pursuit of justice.

### A. The ‘Show Trial’ on Trial: The Quest for Definition

Any effort to define a term as protean and malleable as ‘show trial’ involves a procrustean situation. From the discussion above, it is safe to argue that there cannot be a definition that is at once broad, elastic, or narrow enough as to encapsulate the numerous juridical, political, motivational or epistemological considerations that render a given trial a ‘show trial.’ It is a term used to designate a set of juridical processes which expand along a continuum of predictable outcomes. In most cases, notwithstanding the various political considerations that shape the nature of the ‘show,’ most courtroom proceedings are dubbed a ‘show trial’ due to one major reason: the reduced or eliminated risk of acquittal. But it is important to note that the reduction or elimination of the risk of acquittal is what foregrounds the extra-legal agendas pursued in a legal forum and performs profoundly within and outside the courtroom through a system of rules.

Other than distinguishing the range of factors that render the outcome of a trial predictable, attempts at providing a singularly determinative definition that captures the conflicting and nuanced<sup>108</sup> usage of the term with a sufficient degree of specificity, generality, and flexibility is not only futile, but also inevitably under/over inclusive. As posited above, although the label is used in a pejorative sense to designate a trial’s deviance from ordinary judicial processes, there is a plethora of legal literature that uses the label in a positive sense, especially within the restorative justice movement. Thus, if the characterization of a trial as a ‘show trial’ signifies anything, its significance lies in understanding what makes it a ‘show trial’ within different historical, normative, and political frames, and the specific nature of the ‘show’ intended by those controlling the ritual.

The reviews of the popular press and the legal literature above demonstrate the many different ways humanity relies on language to express feelings, motives, and judgments on discourse. Indeed, it highlights the constructed nature of the world

106. LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* 3 (Yale Univ. Press 2001).

107. Falk, *supra* note 63, at 37. Although Arendt makes note of the confessions that are probably tortured or extorted out of Eichmann, the way the defendant behaved himself during the trial made it appear that he has given all the statements voluntarily. Whatever the case, with the entire dramatization, Israeli courts of the 1960’s were way different from the theatre halls of Stalin’s USSR.

108. See, e.g., Mark Osiel’s and Hannah Arendt’s capacious use of the term in a manner consistent with liberal morality and the dictate of natural justice.



we live in—constructed of meanings and symbols conveyed through language. Here, the term ‘show trial’ is used to capture several different forms of trials, ranging from those with the highest purposes and aspirations of building a society founded on just principles to those cynical and unjust Stalinist and Nazi aberrations of justice. Nevertheless, without prejudice to other conditions and without being singularly determinative, the following can serve as potential identifying markers of ‘show trials’:

1. The defendant’s conviction is obvious regardless of the fairness of the procedure.
2. There is a deliberate undertaking to educate, revisit history, and create memory.
3. There is a deliberate screening of confessions to construct fictitious truth from tortured confessions.
4. There is a political motivation behind the prosecution.
5. The defendants are political foes or adversaries of the prosecuting regime.
6. There is a deliberate undertaking to show national and international audience the efficacy and authority of the rule of law.
7. There is an emphasis on image creation or image saturation.
8. There is a deliberate emphasis on issues that are of less importance to the central function of the trial.
9. Reduced penalties in serious crimes in return for the full disclosure of the truth [restorative justice approach].

## **B. Show Trials: Contextualizing the Politicization of the Courtroom**

In the foregoing, I have tried to shed light on the multi-faceted nature of the ‘shows’ in the ‘show trials’, the permutation of the term, and its progressive crystallization into a *sui generis* juridical concept. Without emphasizing the question of what counts as an act of politicization of the courtroom, this section will explore the ways in which political agendas are strategically pursued to disrupt or consolidate the dominant narratives, how we recognize and transform them, and how the political use of the courtroom denaturalizes the juridical character of the criminal trial.

In his article, *Unpacking Show Trial: Situating the Trial of Saddam Hussein*, Jeremy Peterson identifies two conditions which distinguish a ‘show trial’ from ordinary criminal trials. The first is the existence of an “increased probability of

the defendant's conviction resulting from the planning and control by authorities of the trial."<sup>109</sup> The second condition pertains to the act of designing and planning the trial in a way that serves the interest of groups external to the courtroom as opposed to "securing justice for the accused," the victim, and the body politic.<sup>110</sup> Both of these conditions carry serious ramifications for the legality and legitimacy of the trial.

The legality or legitimacy of a trial can be questioned for several reasons. Since the courtroom historically operates on the basis of detailed, canonical sets of rules with shifting meanings often under constant elucidation, any procedural or substantive deviance or misapplication of due process rights might make a trial a 'show trial.' However, to characterize a trial as a 'show trial' for the misapplication of a rule is simply a misnomer. In order for a trial to have an attribute of a 'show trial' of any modality, there must be an end—oppressive or emancipatory—pursued behind a façade of legality. A misapplication of a rule can be a mistrial or an unfair trial, but it is not a show trial. A show trial always has a story to tell, a theatre to show, an image to create, and an agenda to perform with consequences that go far beyond the courtroom. It is this performative potential of the 'show trial' that makes it ideal for political agendas.

Of course, legal formalists such as Hannah Arendt and Otto Kirchheimer would argue that the absence of a 'risk' of acquittal or conviction is the central axiom that provides the show trial's classic architecture.<sup>111</sup> Although there is a growing body of scholarship which insists on a more nuanced and capacious use of a trial within the liberal legalist paradigm, provided that the rule of law and the fairness of the trial is secured, the presence or absence of 'risk' of acquittal or conviction is always the determinant factor.<sup>112</sup> The difference between the liberal legalists, who advocate for a more capacious use of the trial, and the legal formalists does not turn on the presence or absence of 'risk'. Rather, it is the means by which the non-judicial—i.e., historical, pedagogical, or political—ends are achieved. There are, of course, several other differences between the two camps on detailed procedural questions. For example, an individual's guilt could be obvious from evidence in the possession of the state or other circumstances and that might lead the state to speak of the sentence, presuming that the defendant is guilty. Positivists and strict constructionists would argue that this violates the defendant's right to a presumption of innocence. However, for liberal legalists, this violates the defendant's right to a presumption of innocence only formally, not substantively. For the latter, since what the defendant is guaranteed is only a fair trial, not a perfect one, the formal infringement upon his right to presumption of innocence can be justified or tolerated in pursuit of a judicious liberal purpose.

109. Peterson, *supra* note 20 (emphasis added).

110. *Id.* (emphasis added).

111. See EICHMANN, *supra* note 98, at 266.

112. In addition to the list of literature provided in note 35, see also Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and the General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?* 43 VA. J. INT'L L. 173 (2002).

However, trials with political agendas involve phenomena that Paul G. Schervish calls “deviance construction”<sup>113</sup>—a situation of deviating from ordinary rules and procedures of trials which determines their very success as ‘show’ or ‘political’. As Jeremy Peterson argued, ‘show trials’ typically involve prior planning and an on-stage control of the trial process by the authorities.<sup>114</sup> The state prosecution is the party that usually gets to maneuver the devices of justice to suit its political or didactic goals. The defendants usually earn the opportunity for political contestation when the state drags them into a court for politically motivated crimes. Irrespective of the question of who plans and controls the trial, the process of prior planning can be achieved through several strategies ranging from a deliberate and systemic amendment of substantive and procedural rules to a covert or overt act undermining the judicial process.

Through performative strategies, trials labeled ‘show trials’ stage a spectacle of some form to promote a partisan political goal in most autocratic systems and a liberal legalist agenda in consolidated democracies. In most cases, the deployment and invocation of performative strategies by the defense and the prosecution collide head on with the communicative space necessary for the trial’s performativity and with conservatizing rules of criminal justice. To return once again to the preeminent writer on the subject, Kirchheimer states that indeterminacy of the trial outcome is the distinguishing feature of every fair criminal trial.<sup>115</sup> The idea of the performative, cognizant in most instances of ‘show trials,’ preemptively thwarts the interest of justice by removing the central safeguards of the accused against the coercive power of the state. If the element of risk is removed, there is very little reason why a political defendant would submit to the regime’s institutional violence. In performative terms, if the defendant refuses to defend himself, it will be a lose-lose-situation for all. Indeed, refusing to defend, in itself, is politically performative. The moment the ‘risk’ element of a trial is tampered with and the outcome is predetermined, the trial ceases to be a fair trial. The absence of one of the central requirements of a trial, fairness, ultimately taints the legitimacy, and even the legality of that trial. Therefore, the idea of risk minimization through the planning and control of the trial procedure, which is one of the defining characteristics of ‘show trials,’ is the means through which politics intrudes into the conservative space of the courtroom.

These questionable strategies are vast and various. They depend on the nature of the political and legal order within which the trial is staged. They include, but are not limited to, restricting or expanding the scope of admissible evidence in court, a restriction on the right of cross-examination, admission of hearsay evidence, the admission of inadmissible and irrelevant evidence, relaxing standards of evidence and guilt, on stage control of trial proceedings, etc.

113. SCHERVISH, *supra* note 53, at 195.

114. Peterson, *supra* note 20, at 260.

115. ARENDT, *supra* note 62, at 266.

### C. The 'Show Trial' as a Tool of Historical Instruction: The Pedagogies of Trials

Some trials profess to teach lessons: historical, legal, or political. The pedagogical aim of a trial, an aspect of a didactic debate, raises another problem of legality depending on the kind of lessons being taught, the how and why of the pedagogy. Even if one accepts the use of a trial forum for pedagogic purposes, opening up the system of criminal justice for such a purpose will denaturalize and threaten the integrity of the entire system and its ability to unearth the truth and render justice. The very convention that is the basis of which the adversarial battle is conducted makes the trial unsuited for pedagogy. The narratives told at trial do not provide a lens through which to reflect on conflicting issues of wider political or historical significance over which the battle for pedagogy is waged. These events and stories are crafted narrowly and pigeonholed to fit a particular statutory provision. The 'either-or' binary communication at trial structurally removes the many possible explanations of a historical or political event. In an 'either-or' communicative space that is always prone to a fallacy of false dichotomy, which version of the pedagogy should be validated as the true version—the Court's, the Defendant's, or the Prosecution's?

The versions of truth presented by the trial protagonists are probably the least credible for they are there to vindicate their own position and impeach the legal and political provenance of their adversaries. They are not in the legal battle to validate or affirm the alternative truth presented by their adversary, unless the governing ideology of the trial is that of Vyshinskysm. What about the judge's version of truth? As institutions that take the juridical structures of the state as their foundations and are primarily set up to secure the political order, they cannot be a neutral arbiter of a political conflict that is, by definition, partial. Their claim of neutrality in judging a dispute that seeks to displace the very laws that allowed their existence collapse on its face.

That said, such an account does not exclude the possibility of conceiving a trial as a communicative forum that allows society to explore the liminal spaces of politics, its basic ethical contradictions, paradoxes and hypocrisies. It is through Socrates' *Apology* that we understand Athenian tyranny and the ideals of Greek culture today. His 'apology' and refusal to escape death stands as a lighthouse that nourishes the tradition of free intellectual thought and inquiry in the ever-burgeoning social movements all over the world.<sup>116</sup> He planted the seed of political martyrdom—the most extreme self-sacrifice for the bigger good—out of which many political martyrs resistant to oppression and mindless orthodoxy have grown over the course of centuries. The trial of Jesus Christ (30 A.D.) is central for understanding the Christian faith. Without a comprehensive understanding of the trial of Joan of Arc (1431), Louis XVI (1792), Alfred Dreyfus (1894), Klaus Barbie (1987), and Papon (1981-98), our understanding of the emergence of the

116. See CHRISTENSON, *supra* note 22, at 108-10.

French society would be incomplete.<sup>117</sup> The trials of John Peter Zenger (1735), Susan B. Anthony (1837), Sacco and Vanzetti (1921), John Scopes (1925), the Scottsboro Boys (1931-37), the Rosenbergs (1951), the Chicago Seven (1969-70), and O.J. Simpson (1995) are fundamental to understanding America's political and racial legacy.<sup>118</sup> No serious historian can write the genealogies of more than a century of struggle by South African people for self-liberation without a proper documentation of the Rivonia Trial. Without understanding Sophocles's *Antigone* and the trial of Susan Anthony, the feminist movement would have had a different sense of mission.<sup>119</sup> In her trial, just like Socrates, Anthony told the judges that if the United States Constitution refuses a broader construction that guarantees equality for all its citizens, "I ask not leniency at your hands—but rather the full rigors of the law."<sup>120</sup> Just as Socrates in 399 B.C. intended to create a rupture by engaging in a critical inquiry confronting the moral and ethical imperatives of his own society, Susan Anthony wanted to educate "all women to do precisely as [she has] done, rebel against your man-made, unjust, unconstitutional forms of law that tax, fine, imprison, and hang women, while they deny [her] the right of representation."<sup>121</sup> The trials of these phenomenal figures revealed to the world not only their intellectual and philosophical commitments, but also how in a society that appreciates simple lies more than hard truth, knowledge can be used to disrupt hypocritical and uncritically ideological arguments.

In important ways, although these trials did not resolve the fundamental contradictions that pervade society's political order, the mere excavation, deconstruction, and re-construction of the underlying conflicts and loyalties they bring about, in-and-of itself, enriches our understanding of the relationship between law, politics, and power. As Lawrence Douglas argues in *The Memory of Judgment*, there is no doubt that trials can function as instruments of historical instruction. The problem with this thesis is not on the possibility, but rather on the methodology with the ways in which the trial is made to have a pedagogic effect. Although Douglas calls for a more capacious understanding of the trial to accommodate far-reaching historical edification, such a didactic stunt overwhelms the juridical function of the trial, and, therefore, detracts attention from the primary goal of normative reconstruction. A deliberate and prejudicial interference in the juridical process for the sake of pedagogy does not deliver on the mission of pedagogy itself, let alone serve the dual task of historical edification and normative re-construction. As Milner Ball observes, "[t]rials may indeed have an educative effect, but they have this effect when, instead of deliberately undertaking to teach,

117. These are trials that have not resolved the deeper ethical contradictions and hypocrisies of the French society that sought to judge the few for actions they themselves are responsible for. However, the trials have offered them the opportunity to face what is always an uncomfortable story.

118. CHRISTENSON, *supra* note 22, at 108-10, 256-59.

119. See generally, JUDITH BUTLER, *ANTIGONE'S CLAIM: KINSHIP BETWEEN LIFE AND DEATH*, (Columbia Univ. Press 2000); CHRISTENSON, *supra* note 22, at 109.

120. CHRISTENSON, *supra* note 22, at 109.

121. *Id.*

they treat the parties as individuals.”<sup>122</sup> He further adds that, “[i]nsofar as a [trial] is made a platform for moralizing or a forum for educating, a trial is not a trial.”<sup>123</sup>

As questionable as the pedagogic<sup>124</sup> ends of a trial are, a ‘show trial’ staged with the sole purpose of educating or showing, even when staged within democratic nations, violates, at least formally, the defendant’s right to be presumed innocent. The defendant is not guaranteed a perfect trial, but only a fair one. The right to a fair trial, now a well settled Due Process right of the defendant, guarantees the true essence of a trial’s legitimacy and justice.<sup>125</sup> However, the ‘show trial’ staged within constitutional democracies in which the courts claim strong political authority and independence signifies a different kind of ‘show’ reflective of the case and the judicial system.

An example will illustrate how a ‘show trial’ within a consolidated democracy performs a ‘show’ that violates the defendant’s right in a limited sense. Much has been written about the detention conditions in Guantanamo, and several legal battles have been fought over the proper status of the detainees and the scope of the rights to which they are entitled.<sup>126</sup> While many on the left argued that they are entitled to American justice, those to the right of center argued that they are neither civilians nor combatants, and hence, entitled to no legal protection. After months of bickering and political calculations, on 13 November 2009, the Obama administration decided to transfer five of those accused of masterminding the 9/11 attack for a trial before a civilian court in New York City.<sup>127</sup> The President, a former constitutional law professor, preempted the judgment of the court declaring that, “Americans won’t find it offensive when Khalid Sheik Mohammed (known as KSM) is convicted and when the death penalty is applied to him.”<sup>128</sup> Attorney

122. MILNER S. BALL, *THE PROMISE OF AMERICAN LAW* 56 (1981).

123. *Id.*

124. There is a pragmatic and compelling argument in the theory of restorative justice on the utility of a trial as a pedagogic forum. This approach seeks to foster a spirit of reconciliation by using the trial forum as a legal moment for clarity and purpose, of visibility and audibility for the silenced and subjugated, by allowing them to confront their past and (re)creating knowledge and acknowledgment about the nation’s true history. If, as Judith Shklar argues, such a trial contributes to legalism in an already lawless state and strengthens “constitutional politics,” it might be tolerable as the comparative end it seeks to serve proportionately outweighs the right of an individual accused. Crucial here are still the motif and the nature of politics driving the trial process that legitimizes the ‘show.’ For Shklar’s and Osiel’s version of ‘show trials’ to bear fruit, however, the perpetrators must be given the opportunity to set straight their own account of the record. It is true that this has its own risks: the perpetrator could abuse the trial process as a self-serving political forum or obstruct the proper and expeditious conduct of the trial. Nonetheless, a state-controlled trial process no doubt makes the state the ultimate decider. Even if the perpetrator was allowed to speak directly to his political constituencies (sympathizers) outside the courtroom, the state which orchestrated the trial’s design and management in the first place, would ultimately decide how much “show” will be tolerated.

125. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 14.

126. See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Boumediene et al. v. United States* 553 U.S. 723 (2008).

127. See Charles Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, N.Y. TIMES, Nov. 13, 2009, available at [http://www.nytimes.com/2009/11/14/us/14terror.html?\\_r=1](http://www.nytimes.com/2009/11/14/us/14terror.html?_r=1).

128. In interview with Chuck Todd, President Obama said “I don’t think it will be offensive at all when he’s convicted and when the death penalty is applied to him.” Dan Amira, *Obama Guarantees the Death of KSM, Sort of*, New York Magazine, available at [http://nymag.com/daily/intel/2009/11/obama\\_guarantees\\_the\\_death\\_of.html](http://nymag.com/daily/intel/2009/11/obama_guarantees_the_death_of.html) (last accessed Feb. 22, 2010).

General Eric Holder, one of America's best criminal law minds, said that he would ask federal "prosecutors to seek death sentences for Mr. KSM" and the other four and that "the world would see him for the coward that he is" regardless of the spectacle he might hope to stage.<sup>129</sup> Although the American justice system is arguably one of the world's most effective, the preemption by both the Attorney General and the President of the Defendant's conviction and the penalty to be imposed, goes a long way in denying the Defendant's right to be presumed innocent and is likely to affect the impartiality required of the jury.

There is something suspect here and questions must be raised. The first question is this: if the administration already knows that they are guilty and that a death penalty is in store for them, then why try them in the first place? How is their trial a fair one if they are already presumed guilty and their sentence predetermined by the government? At any rate, if the trial is meant to show the world that America provides the most hardened of criminals the luxuries of American justice, there is an element of 'show' in this trial. Steve Benen said, "[b]y giving this suspected monster a fair trial, we can prove to the world the strength of American values and the integrity of the American system."<sup>130</sup> Emphasizing the looming spectacle and highlighting the peculiarity of this 'show', James Taranto argued that, "[t]hese trials will differ from an ordinary 'show trial' in that the process will be fair even though the verdict is predetermined."<sup>131</sup> The second question that supports the above conclusion over the administration's decision to try only five of the leading suspects before a civilian court while other detainees will be tried before an improved (in terms of due process guarantee) military commission: what accounts for such a differential, if not discriminatory, treatment?

In situations such as the 9/11 trials, Arendt's collectivist approach at justice might be an interesting insight to explore. According to Arendt, society defines an action or omission as an offense sanctioned by law and imposes punishment based on the gravity of the offense. Therefore, when offenses are committed, they are committed not only against the immediate victim who personally suffered the harm resulting from the offense, but also against society, the body politic against whose law the offense is committed. These offenses produce two victims: the immediate individual and the body politic. Since they are both victims, they both deserve justice and redress. A trial of an offense must, therefore, do justice not only to the immediate victim, but also to the society whose laws and orders are offended. In that sense, a trial must be staged for the purpose of all those for whom it caters to dispense justice: the individual and society, and in that sense, it must be staged for all of them and, hence, a 'show trial' for all. The dictum that justice must be seen to be done is consistent with the ideals of the right to a public trial and open justice, and as such, the need to stage the 'show' for the consumption of the larger

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129. Savage, *supra* note 127.

130. Taranto, *supra* note 17.

131. *Id.*

audience.<sup>132</sup> In particular, when the offense in question is so massive and grave, the body politic, either at the national or at the international level, needs to be redressed. If placed within a liberal legalist proposition that seeks to demonstrate the efficacy and sober authority of the law, the 'show' may not be in stark contradiction with the requirements of justice.

## V. CONCLUSIONS

A trial becomes a 'show trial' only when it involves a matter of public concern or a public figure. In most cases, juridical exercises dubbed 'show trials' deal with matters that are irreducibly political and only incidentally legal. They become subjects of concern, because the stories and narratives they unburden are stories that the society desperately needs an answer to—one that strikes home with every politically informed citizen. In some cases, they are stimulants, since they unravel fundamental social conflicts that are discursively concealed and presented as natural, and help in formulating our sense of public morality. In short, they have the potential of awakening critical consciousness if the moment and the space are used as a communicative space.

However, it is not always the case that trials can be used for profoundly good ends. In fact, the lexicon of 'show trial' evolved within a political setting that utilized the courtroom, not for emancipatory purposes, but for purely coercive ideological ends. The Soviet Union throughout Stalin's era and Nazi Germany embarked on a grand project of enlisting court actions for political purposes and widely used the devices of justice in a perverted fashion to terrorize, dominate, and control.

Today, the term 'show trial' is strictly contextual. Although that same lexicon can be used to denote a trial used to intimidate and terrorize political deviants, on the one hand, and those used as part of spectacles of resistance for emancipatory ends, the susceptibility and appropriation of the term to signify different practices requires a more careful and comprehensive reading of the context and the sense in which the term is used. Therefore, instead of presuming 'show trials' to be a contradiction to justice, the examination of the condition that rendered a particular trial a 'show trial' and the nature of the 'show' involved helps to clearly account for what is happening in the political order.

While these trials are a double-edged-sword that can be used both for oppressive and emancipatory ends, the lexicon of 'show trial' has been appropriated to signify these mutually exclusive and irreconcilable ends. However, what is central to this article was to show the ways in which we can fully account for that which is disguised, that which is discursively concealed, and the means by which we can performatively reveal it, disrupt it, expose it, and transform it for the good of the social order.

132. See, e.g., *The Queen on the Application of Binyam Mohammed and the Secretary of State for Foreign and Commonwealth Affairs*, Case No. T1/2009/2331, (February 2010), Paras-3, 24, 34-42 (For a detailed analysis of the requirements of Open Justice, see Paras--3, 86, 188, 224, 226, 230, 234).



It was Hannah Arendt that gave us the most authoritative, but also contentious statement about the purposes of the criminal trial. In *Eichmann in Jerusalem*, the non-lawyer Arendt wrote in starkly conclusive terms that “the purpose of the trial is to render justice and nothing else.” Although many openly disagree with this excessively restrictive Arendtian construction of the purpose of the trial, her critics agree that rendering justice is indeed the primary, if not the sole, purpose of the trial. The trial enjoys a paramount importance in society due to the relative neutrality and impartiality of courts of law in power struggles. It offers a legal moment and a ritual space that registers legally and the consciousness of the *body politic*. Whatever its limitations in serving purposes external to the law, it has been a melting pot for liberal and conservative thoughts, free scientific inquiry, emancipation, and social change. From Socrates to Jesus of Nazareth, from Galileo to Susan B. Anthony—a figure from whose struggle the feminist movement draws a sense of its struggle, from Eugene Debs to the Berrigans, and from Martin Luther King, Jr. to Nelson Mandela, their performative utterances in the courtroom have changed the course of history. Despite the constraining, hierarchical, structural, and rule-based forum that the court of law is, the communication that takes place in that legal moment, as Martin Luther King, Jr., drawing on Socrates, held “created a tension in the mind so that individuals could arise from the bondage of myths and half-truths” to challenge power and authority. Therefore, as ‘society’s own judicial review,’ trials serve as clarificatory moments for the myths and fundamental conflicts of the society. What counts is not that a trial is labeled a ‘show trial’; it is, rather, the end that the ‘show’ serves.